Supreme Court, U.S.
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No. 07-100

In the Supreme Court of the United States

KAY STALEY,

Petitioner,

v.

HARRIS COUNTY, TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

If this Court reviews the Fifth Circuit's en banc ruling on vacatur, should it also review the en banc court's justiciability determination in order to avoid inconsistency and fundamental unfairness in the rulings?

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

For all the reasons set forth in the Brief for the Respondent in Opposition to the County's Petition, the en banc decision of the Fifth Circuit does not warrant review by this Court. If, however, this Court were to review the en banc court's ruling on vacatur, then this Court should also review the lower court's conclusion that the case is nonjusticiable. Those issues are inextricably intertwined in this case; and the vacatur arguments raised in the County's Petition implicate and conflict with the justiciability arguments that the County made below. Thus, reviewing the vacatur determination without also reviewing the justiciability determination would invite a logically incoherent and fundamentally unfair result.

OPINIONS BELOW

Cross-Petitioner incorporates by reference the statement of the Opinions Below set forth in the County's Petition.

JURISDICTION

Cross-Petitioner incorporates by reference the jurisdictional statement in the County's Petition, and adds the following: Cross-Petitioner Staley received the County's Petition for a Writ of Certiorari on July 30, 2007.

CONSTITUTIONAL PROVISION INVOLVED

Cross-Petitioner incorporates by reference the statement of the Constitutional Provision Involved set forth in the County's Petition.

STATEMENT

A. The Factual Background

Cross-Petitioner incorporates by reference the Factual Background set forth in the Brief for the Respondent in Opposition to the County's Petition.

B. The Proceedings Below

Cross-Petitioner incorporates by reference the statement of Proceedings Below set forth in the Brief for the Respondent in Opposition to the County's Petition, and adds the following:

The courthouse renovation, and its effect on the monument, came to light while this case was before the en banc court, so the district-court record includes no evidence or findings on the factual questions pertinent to whether the case is moot or whether the County is entitled to vacatur. The County did, however, make some factual representations directly to the en banc court.

1. The County made representations about its reasons for removing the monument, stating:

> [T]he closure and renovation of the courthouse were part of a preexisting restoration plan to overhaul the entire courthouse building and the surrounding property at a cost of some $65 million. Obviously, these actions were not taken for the purpose of mooting this dispute.

County's En Banc Br. 11.

The County also made representations to the en banc court about its intentions regarding redisplaying the monument, stating:

> When the Monument is again displayed to the public, it will be in a different location, because the redesign of the courthouse building and plaza will make it a physical impossibility to return the Monument to its past location.
>
> . . . .
>
> . . . [W]hen the Monument is again displayed to the public, it will . . . be a wholly different Monument. . . . [T]he physical location of the Monument, the public

> context, the neighboring monuments and displays, the dedication statements ... — will all be different.

County's En Banc Br. 8, 10.

The County relied on these assertions to argue that the case should be found moot, that the redisplay was unripe for review, and that the district court's decision should be vacated. *See id.* at 10-12.

2. On the basis of the County's representations, and in light of the County's removal of the monument four days before oral argument, the en banc court concluded that "[a]lthough the timing of the removal may be open to question, . . . the bottom-line cause of the removal was related to the ongoing renovations." Pet. App. 10a.

With respect to the redisplay, the en banc court held that:

> [A]ny dispute over a probable redisplay of the Mosher monument is not ripe because there are no facts before us to determine whether such a redisplay might violate the Establishment Clause. Indeed, no decision has been made regarding any aspect of the future display of the monument. In the absence of this evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* [*County v. ACLU of Kentucky*, 545 U.S. 844 (2005)], and *Van Orden* [*v. Perry*, 545 U.S. 677 (2005)]. Thus, any claim that the Establishment Clause may be violated after the Courthouse and grounds have been renovated, is not ripe for review.

Pet. App. 6a.

Finally, although the court found that the arguably benign reason the County advanced for the monument's removal was relevant to vacatur, the court concluded that the proffered justification was outweighed by other equitable factors calling for retention of the district court's decision. *Id.* at 10a-14a.

3. Two judges agreed with the majority that the case was nonjusticiable but parted company with the majority on vacatur, expressing the view that vacatur should always be granted when the mooting action is taken for reasons unrelated to the appeal. *See* Pet. App. 18a-25a (DeMoss, J., joined by Smith, J., dissenting in part). They thought that the County had established that it removed the monument without an illegitimate motive. *Id.* at 21a.

4. Three other dissenters did not believe that the County's statements to the en banc court carried the day on mootness. *Id.* at 16a-18a (Garza, J., joined by Clement and Owen, JJ., dissenting). They explained:

> [Harris County has not] made it absolutely clear that the Establishment Clause violation alleged to have occurred in this case could not reasonably be expected to recur. . . . Although Harris County asserts in its appellate brief that the redesign of the Courthouse will make it a "physical impossibility" to return the monument to its precise former location, such an assertion is not sufficient to satisfy the heavy burden of persuasion borne by Harris County, particularly since Harris County has made clear its intention to redisplay the monument once the renovations are complete.

Id. at 17a (internal citations omitted). Accordingly, these three dissenters would have remanded the case to the district court for factfinding on the County's plans and intentions. *See id.* at 18a.

REASONS FOR GRANTING THE CROSS-PETITION IF THE COUNTY'S PETITION IS GRANTED

If this Court Grants Review on Vacatur, it Should Also Consider the Related Issue of Justiciability, So as to Avoid a Logically Incoherent and Fundamentally Unfair Outcome.

A. Vacatur and justiciability turn on overlapping factual predicates.

Many of the considerations pertinent to a ruling on mootness also figure prominently in an assessment of the propriety of vacatur.

One of those considerations is the intent behind the allegedly mooting action. If a defendant acts with the specific intent to moot a case and intends to return to the challenged behavior once the case has been dismissed, the case is not moot. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." (quoting *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952)). Similarly, if a defendant capitulates with the specific intent to undo an unfavorable decision, that fact will weigh against vacatur. *See* Br. for the Resp't in Opp'n 14-20.

A second factual matter on which both mootness and vacatur can depend is the litigants' timeliness in bringing the mooting event to the courts' attention. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court held that the closure of the plaintiff-establishment did not moot a challenge to nude-dancing regulations in part because the establishment had failed to "mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari, which was filed in April 1999, even though . . . [the establishment] was closed and that property sold in 1998." *Id.* at 288. Likewise, in *Arizonans for Official English v. Arizona*, 520 U.S. 43

(1997), this Court vacated a district-court decision in the plaintiff-employee's favor in part because the employee had failed to timely inform the courts of her resignation. *Id.* at 74-75.

A third inquiry relevant to both justiciability and vacatur is the length of the litigation. Thus, in addressing mootness in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000), this Court noted:

> It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.

Id. at 224. Likewise, the court below noted in denying vacatur that "Staley prevailed not only in the district court but also before a panel of this Court." Pet. App. 12a-13a.

Yet another overlap arises with respect to the likelihood that the challenged action will recur. A case is moot under the voluntary-cessation doctrine only if the defendant meets "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Likewise, if the party that mooted the case on appeal intends to revert to the challenged behavior after the trial court's decision is vacated, the courts of appeals treat that fact as an equitable consideration counseling against vacatur. *See, e.g.*, Pet. App. 13a-14a (considering, as part of vacatur analysis, that "the County has pledged to display the monument again," and concluding that retaining district-court decision would "serve[] the judicial and community interests by discouraging relitigation of the identical issues by the same parties under the same circumstances"); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir.

2000) ("given that . . . there is no suggestion of the[] likely reenactment [of the challenged statutes], we see the public interest as no bar to vacatur").

That mootness and vacatur turn on overlapping considerations is hardly surprising, given that both doctrines speak to whether a litigant must continue to answer for the challenged behavior. And in light of the overlap, these issues will in some cases need to be considered together.

B. The en banc court's rulings on justiciability and vacatur were inextricably interrelated.

Courts have generally been willing to find a case moot and vacate a judgment for the plaintiff *only* when it is abundantly clear that the challenged behavior will not be repeated. *See, e.g.*, *Rendell v. Rumsfeld*, 484 F.3d 236, 241 (3d Cir. 2007); *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001); *Valero*, 211 F.3d at 121; *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995).

When, however, there is a reasonable likelihood that the defendant will return to the challenged activity, finding the case moot and awarding vacatur would be both judicially wasteful and fundamentally unfair to the non-mooting party because it would allow a repeat of the challenged behavior and relitigation of "the identical issues by the same parties under the same circumstances." Pet. App. 12a-14a. Accordingly, this Court has generally held that a case remains justiciable (and vacatur is therefore not even considered) when the defendant is reasonably likely to resume the activity. *See, e.g.*, *City of Erie*, 529 U.S. at 287 (plaintiff-establishment's closure did not moot challenge to nude-dancing regulations because plaintiff was "still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie"); *City of*

Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (case not moot because "city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated"); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (change in contracting regulations and dissolution of defendant-association did not moot case because association's members were not entirely precluded under new regulations from competing for contracts in future); *cf. Laidlaw*, 528 U.S. at 193-94 (remanding for mootness determination where plaintiffs prevailed in district court on claim against alleged polluter and defendant subsequently shuttered offending plant but retained discharge permit).

This case is unusual. It is not only reasonably likely that the County will redisplay the monument; it is a virtual certainty: The County has "pledged to display the monument again" (Pet. App. 13a; *accord id.* at 3a (the "County specifically has asserted that it will display the monument again after the renovations are complete"). But the details of the new display are entirely undeveloped in the record, thereby precluding application of the fact-specific analysis mandated by the Establishment Clause. Pet. App. 6a; *see McCreary*, 545 U.S. at 867 ("under the Establishment Clause detail is key"); *Modrovich v. Allegheny County*, 385 F.3d 397, 402 (3d Cir. 2004) (challenge to religious display "requires a fact-specific, case-by-case analysis"); *King v. Richmond County*, 331 F.3d 1271, 1276 (11th Cir. 2003) ("each [religious-display] challenge calls for line-drawing based on a fact-specific, case-by-case analysis"). Thus, the possibility of recurrence remains though the case has been found nonjusticiable.

This Court faced an analogous situation in *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944). There, the plaintiff had won in the district court, the decision had been reversed by the court of appeals, and the defendant-corporation had then dissolved while the case was pending in this Court. The

dissolution, undertaken "to secure tax advantages," had consisted of the "simple expedient of dissolving [the family business] and continuing the business under the individual control of members of the family." *Id.* at 673, 675. Although the case was not necessarily moot because a ruling could continue to bind the defendant's successors, the legal entity before this Court had ceased to exist. *Id.* at 673-76. So the Court analogized the circumstances to a case having become moot on appeal and held that "justice requires" that "petitioner is entitled to retain the benefit of the judgment entered in his favor by the District Court." *Id.* at 676-77. In disposing of the case in that fashion, this Court struck a balance between justiciability and vacatur: The Court deemed the case nonjusticiable and declined to address the merits, but it protected the judicial interest in avoiding relitigation of the same issues, and the plaintiff's interest in avoiding repetition of the challenged behavior, by retaining the lower-court judgment. *See id.* at 676-77.

In this case, the en banc court struck essentially the same balance. It could give the County the benefit of the doubt on justiciability, finding, without taking evidence, that "the bottom-line cause of the removal was related to the ongoing renovations" (Pet. App. 10a), and implicitly finding that the County did not intend to repeat the challenged behavior. But the en banc court took insurance on those assumptions by retaining the district-court decision, thereby precluding the County from merely repeating the precise behavior that the district court and appellate panel had held unlawful. Pet. App. 14a. That is, the court was willing to deem the case moot despite the County's plans to redisplay the monument — but only with a *guarantee* that the selfsame behavior would not be repeated.[1]

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[1] The court could take that approach without risking inconsistency in the factual predicates underlying the mootness and vacatur rulings because, under the legal standard that the court employed (and that the other circuits apply as well, *see* Brief for the Resp. in Opp'n 17-20), a mooting party's (continued...)

But if this Court were to reopen the vacatur question without also reopening the mootness determination, its ability to protect Staley's and the courts' interests would be compromised. Unlike the multifaceted equitable standard currently applied by the circuits, the County's proposed vacatur standard focuses exclusively on the intent behind the mooting action, turning a blind eye to the possibility of recurrence, the mooting litigant's lack of candor, and the length of the litigation. Thus, if the County's standard were adopted, Staley's ability to retain the district-court decision would be diminished,[2] even though all the other equitable considerations would remain unchanged. Staley would face the perverse result of being stripped of both a favorable decision and the ability to litigate her case to its conclusion, while at the same time having no assurance that the County will not simply repeat the selfsame challenged behavior immediately upon dismissal of the case. And if the County's Petition were granted but this Cross-Petition was not, neither this Court nor the lower courts on remand would be in a position to redress the inequity by taking the additional considerations into account as part of the justiciability analysis — as this Court did in *City of Erie*, 529 U.S. at 287-88 (considering likelihood of recurrence and mooting party's candor), *Adarand*, 528 U.S. at 224 (considering length of litigation), *Laidlaw*, 528 U.S. at 193-94 (considering likelihood of recurrence), *City of Mesquite*, 455 U.S. at 289 (same), and *Concentrated Phosphate*, 393 U.S. at 203 (same).

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[1] (...continued)
intent is just one of the considerations pertinent to vacatur. In ruling on vacatur, the en banc court could assume for the sake of argument that the County had not acted with an illegitimate motive because that consideration would in all events be outweighed by other equitable factors. *See* Pet. App. 10a-14a.

[2] Although the County would not necessarily prevail under the standard that it proposes (*see* Br. for the Resp't in Opp'n 12-13 n.7), its chances of prevailing would be much greater under that standard than under the standard normally applied by the courts of appeals.

C. The interplay between justiciability and vacatur is underscored by the tensions in the County's arguments.

The overlapping factual predicates underlying justiciability and vacatur, and the risk of an inconsistent and unfair result in this case, are highlighted by the inconsistencies between the justiciability arguments that the County made to the en banc court and the vacatur arguments that it now makes to this Court.

In arguing that the case was nonjusticiable, the County claimed that although it intended to redisplay the monument, it could not do so in the same manner as the old display; and hence, the new display would arise in an entirely different factual context that would require an entirely new constitutional analysis. *See* County's En Banc Br. 8, 10-11. The en banc court accordingly held that Staley's challenge to the future redisplay was unripe because that display would be subject to a different "fact-intensive and context-specific analysis" than the one undertaken by the district court. Pet. App. 6a.

In its Petition, however, the County claims that a consequence of retaining the district court's decision is that the ruling "will impede future litigation, should the County decide to redisplay the Monument." Pet. 16. Not only did the County not make that argument to the en banc court (*cf.* County's En Banc Br.), but the claim is fundamentally inconsistent with the positions that the County did take below. If, as the County argued to the en banc court, the circumstances of the courthouse renovation and the County's intentions are such that any redisplay would arise in an entirely new factual context that would require an entirely new constitutional analysis, then there is no reasonable basis to claim that the district court's decision will impede either the redisplay or litigation regarding that redisplay.

The only action that would be impeded by the district court's decision would be placement of the monument in

precisely "the same circumstances" as the old display (Pet. App. 14a), or in circumstances that are legally indistinct from the context of the old display — such as, for example, if the County were to reposition the monument a few feet to the left or right of the old display but otherwise left the context unchanged. But if there is a reasonable expectation that the County may pursue either of those options, as the County's argument suggests, then the case would not be moot. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville.*, 508 U.S. 656, 662 (1993) ("it is [not] only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect").[3]

The inconsistencies in the County's arguments underscore how the issues of vacatur and justiciability are intertwined in this case. For if the case is truly moot, then the challenged behavior cannot reasonably be expected to recur; and if the behavior will not recur, then retaining the decision would protect Staley's interests while causing the County no harm. Finding the case moot on the assumption that the behavior will not recur, while vacating the decision on the ground that retaining it would impede a recurrence, would rest the judgment on inconsistent factual predicates — and would countenance the County's efforts to undo an unfavorable decision by "attempting to manipulate the Court's jurisdiction." *City of Erie*, 529 U.S. at 288.

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[3] The arguments that the County makes regarding attorneys' fees are similarly in tension with the position it has taken on mootness. The mootness finding is necessarily predicated on Staley's having received the relief she requested. *See* Pet. App. 6a ("Out of sight in some warehouse, the monument no longer raises the potential Establishment Clause violations that offended Staley."). Yet in the attorney-fee context, the County argues that Staley has not prevailed. Pet. 15-16. The County cannot have it both ways: Either the case is moot because Staley has prevailed; or Staley has not yet definitively prevailed and the case remains alive.

D. This Court has not hesitated to couple intertwined issues for review.

This Court routinely addresses distinct but related issues in a single case. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677 (2006); *Carey v. Saffold*, 536 U.S. 214, 217 (2002); *Zadvydas v. Davis*, 533 U.S. 678, 686 (2001); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 500-501 (1998); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 516-17 (1984).

The Court has been particularly inclined to do so when one of the questions relates to justiciability. *See, e.g.*, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *City of Mesquite*, 455 U.S. at 288-89; *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 382 (1980); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978); *Sanabria v. United States*, 437 U.S. 54, 62 (1978); *Abney v. United States*, 431 U.S. 651, 655-56 (1977); *United States v. Nixon*, 418 U.S. 683, 690 (1974); *Concentrated Phosphate*, 393 U.S. at 202-03.

A similar course should be followed here in light of the close relationship between vacatur and justiciability in this case.

CONCLUSION

Nothing in this case merits this Court's time and attention. The en banc court's rulings on justiciability and vacatur both entail fact-intensive, case-specific applications of properly stated legal rules. *See* Sup. Ct. R. 10. If, however, this Court were to decide to review the vacatur determination, it should also revisit the justiciability question, because those issues are inextricably intertwined here. Reviewing one without the other would invite a logically incoherent and fundamentally unfair result.

Respectfully submitted.

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IN THE

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HARRIS COUNTY, TEXAS,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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Walling v. James V. Reuter, Inc.,
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BRIEF FOR RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION

Staley's conditional cross-petition asks this Court to review the Fifth Circuit's determination that this matter has become moot. Staley does *not* contend, nor could she, that the mootness question meets this Court's traditional certiorari criteria. That is because the Fifth Circuit's analysis of the justiciability question does not create even an arguable circuit conflict on any issue whatsoever. In fact, even Staley concedes that her justiciability arguments "entail fact-intensive, case-specific applications of properly stated legal rules" (Cross-Pet. 13)—in other words, that this is the archetype for a case that has no business approaching this Court's merits docket.[1]

Nor can Staley reasonably contend that this case is, in fact, justiciable, such that this Court actually should order the Fifth Circuit to decide the merits of her Establishment Clause challenge to a monument that is no longer on display. Indeed, while the thrust of Staley's arguments appears directed to the "voluntary-cessation" doctrine—and, in particular, the notion that the case is justiciable because the County might redisplay the Mosher Monument (the "Monument") in the future—Staley herself concedes that "the details of the new display are entirely undeveloped in the record, thereby precluding application of the fact-specific analysis mandated by

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[1] While Staley asserts that the County's petition also presents fact-bound questions, that is demonstrably untrue. It is not every day of the week that a court of appeals, sitting en banc, rejects this Court's long-standing case law. In fact, under a conventional application of this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)—and under the view of several circuits that continue to follow *Munsingwear*—the County undoubtedly is entitled to vacatur. And, as demonstrated in the County's reply brief in support of petition No. 07-100, the questions on which the County seeks plenary review are the subject of circuit splits that Staley cannot convincingly explain away.

the Establishment Clause." Cross-Pet. 8. In short, Staley has offered no substantial argument that this case presents any legal issue that warrants this Court's attention, or even that the Fifth Circuit was wrong to conclude that the merits of the Establishment Clause issue cannot be decided now.

Unable to show that the mootness ruling should be reviewed based on its own merits, Staley proffers a series of arguments purporting to show that the vacatur and justiciability issues are so intertwined that this Court should review both together. In particular, she contends that (1) the issues of justiciability and vacatur are "inextricably intertwined in this case"; (2) "the vacatur arguments raised in the County's Petition implicate and conflict with the justiciability arguments that the County made below"; and (3) "reviewing the vacatur determination without also reviewing the justiciability determination would invite a logically incoherent and fundamentally unfair result." Cross-Pet. 1. All of these claims are misdirected for the simple reason that this Court is not in the habit of reaching out for fact-bound issues that provide the necessary predicate for the question that *is* certworthy. Each of these claims is also wrong on its own terms.

REASONS FOR DENYING THE CROSS-PETITION

I. This Case Does Not Fall Within The Contours Of The Voluntary-Cessation Doctrine, And The Fifth Circuit's Mootness Determination Is Thus Unsuitable For Review By This Court.

Although she does not fully articulate the presumption anywhere in her cross-petition, Staley relies throughout on the implicit contention that the County voluntarily ceased allegedly wrongful conduct in order to moot the case. *See, e.g.*, Cross-Pet. 5 (suggesting a link between mootness and vacatur analyses where "a defendant capitulates with the specific intent to undo an unfavorable decision"); *id.* at 6 (hinting that the County's conduct in this matter falls within the

scope of the "voluntary-cessation doctrine" for purposes of determining mootness). The Fifth Circuit's conclusion that this case is moot necessarily rejected the notion that the voluntary-cessation doctrine applies here. That is correct; it does not.

Although this Court has indeed held that, under certain circumstances, "the voluntary cessation of allegedly illegal conduct . . . does not make the case moot" (*DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (citations and internal quotation marks omitted)), this doctrine has force only where the conduct voluntarily ceased is the same as the conduct actually challenged in the case. In other words, the defendant must cease the wrongful conduct that is challenged in the suit for the purpose of mooting the litigation and with a view toward resuming *wrongful conduct* after judicial proceedings have been dismissed. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (focusing on whether "the allegedly wrongful behavior" can be "expected to recur"). In this case, it is clear that the County neither removed the Monument to moot the litigation nor plans to replace it in the location and context in which the district court previously adjudicated it to be "wrongful." Since it is beyond doubt that the Monument will never again be located in the place that prompted Staley's suit, it is not the case that the County "is free to return to [its] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Indeed, because even Staley concedes it is impossible to know at this point whether any redisplay will run afoul of this Court's context-sensitive Establishment Clause cases (Cross-Pet. 8), that ought to be the end of the matter.

In *DeFunis*, for example, a prospective law student sued after having been denied admission to a law school, claiming that the school's admission policies discriminated against him on the basis of his race. 416 U.S. at 314. The trial court ordered the school to admit the plaintiff pending appeal. *Id.* By the time this Court had the opportunity to hear oral arguments in the matter, the plaintiff was already in his final quarter of law school. *Id.* at 315-16. The school decided that

it would no longer challenge the plaintiff's enrollment because, pursuant to pre-existing university policies, enrollment in the final term before graduation was irrevocable. *Id.* at 316-17. The school thus did not voluntarily cease the conduct at issue in the case—its effort to maintain its admission policies in the face of the plaintiff's Equal Protection challenge—by making some unilateral change to those policies for the purpose of mooting the litigation. On the contrary, the school simply recognized changed circumstances and voluntarily declined to violate its own policies by attempting to oust the plaintiff in his final term at the school, when he would by the nature of the case never be in the original circumstances again. *Id.* at 318-19. If the school's action had been predicated on the former consideration, the voluntary-cessation doctrine would have applied and the case would not necessarily have been moot. *Id.* at 318.[2] Because it was predicated on the latter, the doctrine did not apply and the case was moot. *Id.*

For the same reasons that the voluntary-cessation doctrine did not apply in *DeFunis*, it does not apply in the instant matter. Here, Staley alleged an Establishment Clause violation based on the positioning and context of the Monument. By the time the Fifth Circuit had the opportunity to hear oral arguments in the matter, the County had removed the Monument in the midst of its long-planned wholesale renovations of the entire Harris County Civil Courts Building (the "Courthouse") and plaza where the Monument had stood. The County did not voluntarily cease the conduct at issue in this case—its effort to maintain the constitutionality of the Monument in its former position and context in the face of Staley's Establishment Clause challenge—by making some unilateral change to that position and context for the purpose

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[2] The voluntary-cessation cases cited by Staley fall into this category. *See, e.g., Friends of the Earth*, 528 U.S. at 189-90 (recognizing that a company's voluntary compliance with pollution standards would not moot a case, where no changed circumstances would prevent a return to its earlier activities).

of mooting the litigation. On the contrary, the County recognized that it had to move the Monument pursuant to its preexisting renovation plans and that the renovations at issue would make it physically impossible for the Monument to resume its former position and context. As in *DeFunis*, circumstances had changed in such a way as to render the former controversy lifeless. That the County voluntarily responded to the requirements of those changed circumstances does nothing to change that fact.

In its mootness analysis, the Fifth Circuit below simply recognized that the changed circumstances brought on by the renovation made it impossible to conduct *any* Establishment Clause analysis with respect to the Monument until it became clear if the Monument would be redisplayed and in what context that redisplay would take place. 07-100 Pet. App. 6a. As discussed further in Part III below, the Fifth Circuit followed this Court's relevant jurisprudence in recognizing the highly fact-intensive and context-dependent inquiries required for proper Establishment Clause analysis. With only one relevant fact clear—that the Monument, the Courthouse, and the plaza could not return to their original conditions after the completion of the renovations already underway—the Fifth Circuit had no alternative but to deem the case moot. It would be unsuitable for this Court to undertake a plenary review of the Fifth Circuit's interpretations of the factual circumstances underlying this determination.

II. The Issues Of Mootness And Vacatur Involve Entirely Separate Inquiries.

Staley further contends that the Fifth Circuit below struck "a balance between justiciability and vacatur" (Cross-Pet. 9), deeming it safe to hold the instant matter moot only because it intended to preserve the district court's judgment. Based on this perception of the Fifth Circuit's holding, Staley argues that it would be inappropriate to reopen the vacatur analysis without reopening the justiciability analysis as well. However, the Fifth Circuit recognized that, far from being inextricably intertwined as Staley would have it, the issues of

mootness and vacatur are entirely separate inquiries. In fact, it would be entirely improper for a federal court to make its threshold jurisdictional inquiries into mootness hinge on its intentions with respect to vacatur or indeed on any other external considerations. Because the Fifth Circuit came nowhere close to employing such an improper hedging tactic, this Court has no reason to review the justiciability holding.

Mootness, on the one hand, is a question of whether the plaintiff's "personal interest that . . . [allegedly] exist[ed] at the commencement of the litigation . . . continue[s] throughout its existence." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (citation and internal quotation marks omitted). If the plaintiff's alleged personal interest no longer exists and the case becomes moot, then there is no "case or controversy" for purposes of Article III of the Constitution such that federal courts have no subject matter jurisdiction. *See, e.g., id.* at 67 (observing that, where a matter is mooted while on appeal, it no longer "qualif[ies] as a case fit for federal-court adjudication"); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (noting that Article III "case or controversy" issues are threshold jurisdictional issues). Because federal courts lack jurisdiction over matters that have become moot, they must decide this issue first and without reference to any other consideration. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). As a jurisdictional analysis, the evaluation of mootness allows for no flexibility or balancing with other factors. *See, e.g., id.* ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (citations and internal quotation marks omitted)).[3]

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[3] Staley suggests that this Court should review the justiciability issue so that it can "redress . . . inequity by taking . . . additional considerations into account as part of the justiciability analysis." Cross-Pet. 10. In support of this proposal, Staley cites *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000);

Vacatur, on the other hand, is a procedure employed *after* jurisdictional issues have been determined. A federal court must take the *results* of its jurisdictional determinations as the *starting point* for its evaluation of vacatur, and cannot conflate the two issues as Staley suggests. Having deemed a matter moot, a court must vacate as a matter of course where, as here, it finds that it was an action unrelated to the litigation that deprived the court of jurisdiction. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). In other circumstances, where, for example, the parties themselves mooted the matter through their own voluntary agreement to settle, a court may take certain equitable factors into account. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). However, as discussed above, in no case may a federal court condition its analytically prior justiciability analysis on its later determinations with respect to vacatur or on any other external consideration.

The Fifth Circuit below quite properly kept its mootness analysis and its vacatur analysis entirely separate. It recognized as an initial matter that "[o]ut of sight in some ware-

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[Footnote continued from previous page]

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); and *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199 (1968). In none of these cases, however, did this Court import equitable considerations into its justiciability analysis. Instead, it focused in each case entirely on the inquiry proper to mootness—whether or not the plaintiff retained a personal interest in the outcome. The Court simply noted in each case that one party's voluntary cessation of wrongful conduct in an effort to moot a case would not terminate the other party's personal interest due to the likelihood of recurrence. *See City of Erie*, 529 U.S. at 287-88; *Adarand*, 528 U.S. at 222; *Laidlaw*, 528 U.S. at 193-94; *City of Mesquite*, 455 U.S. at 289; *Concentrated Phosphate*, 393 U.S. at 203. Here, as discussed in Part I above, the Fifth Circuit understood that any suggestion that the County might redisplay the Monument in its past location, when the redesign and renovation of the Courthouse and plaza rendered such a redisplay physically impossible, could not carry the day in the mootness analysis.

house, the [M]onument no longer raises the potential Establishment Clause violations that offended Staley." 07-100 Pet. App. 6a. Furthermore, the Fifth Circuit held that "because there [were] no facts before [it] to determine whether [a possible] redisplay [of the Monument] might violate the Establishment Clause," it would be impossible "to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*." *Id.* Only *after* it thus "concluded that this appeal [was] moot" (*id.* at 7a) did the court turn to the question of "whether to vacate the district court judgment" (*id.*). The court gave no hint whatsoever that it was somehow striking "a balance between justiciability and vacatur" (Cross-Pet. 9) or using vacatur as "insurance" on its mootness holding (*id.*). A court may not strike a balance with other considerations in its jurisdictional analysis, and the Fifth Circuit below did no such thing.[4]

III. The Vacatur Arguments Raised By The County Before This Court Do Not Conflict With The County's Arguments Concerning Justiciability Before The Fifth Circuit Below.

In a continued struggle to link the issue of justiciability with the question of vacatur, Staley seeks to manufacture tension between the County's arguments regarding the former issue before the Fifth Circuit below and the County's argu-

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[4] Staley cites *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944), as a case in which this Court purportedly struck a similar "balance." *See* Cross-Pet. 9. On the contrary, nowhere in *Walling* did this Court even intimate that a federal court could or should conflate its jurisdictional and its vacatur analyses. Instead, this Court made the uncontroversial point that, because it would be practically impossible to proceed with the appeal due to lack of proper parties, it should leave the district court judgment intact and allow the relevant entities to appeal any attempted enforcement of that judgment. Like the Fifth Circuit below, the Court in *Walling* had already concluded its mootness analysis before entering into its vacatur analysis. It engaged in no "balancing" act between the two.

ments regarding the latter issue before this Court. No such tension exists.

Staley points to only one source of such alleged tension.[5] She argues that the County's argument (to the Fifth Circuit in support of mootness) that "it could not [redisplay the Monument] in the same manner as the old display" (Cross-Pet. 11) somehow conflicts with its argument (to this Court concerning the importance of vacatur) that the district court's ruling "'will impede future litigation, should the County decide to redisplay the Monument'" (*id.* (quoting 07-100 Pet. 16)). These arguments do not conflict at all. In fact, far from concealing its earlier argument, the County has already reiterated to this Court that "[t]he redesign of the Courthouse and plaza will make it physically impossible to return the Monument to its past location." 07-100 Pet. 5 n.1. Staley's perception of tension between this assertion and the County's statements elsewhere in its petition merely betrays her persistent confusion regarding the relationship between mootness and vacatur.

The County's statements concerning the redisplay of the Monument were designed to address the Fifth Circuit's concerns about mootness. In its mootness analysis, the Fifth Circuit properly followed *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677

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[5] In a footnote, Staley also oddly contends that the "arguments that the County makes regarding attorneys' fees are . . . in tension with the position it has taken on mootness. . . . Either the case is moot because Staley has prevailed; or Staley has not yet definitively prevailed and the case remains alive." Cross-Pet. 12 n.3. Staley thus shows a fundamental misapprehension of the mootness doctrine. A matter does not become moot because a party prevails. A matter becomes moot when the plaintiff no longer has a "personal interest" sufficient to give rise to an Article III "case or controversy." *Arizonans for Official English*, 520 U.S. at 68 n.22. Here, the fundamental changes in the circumstances from when Staley originally brought suit deprived her (and anyone else) of the concreteness that Article III requires. It is those changes that rendered the case moot.

(2005), in recognizing the fact-intensive nature of Establishment Clause cases. *See, e.g.*, 07-100 Pet. App. 5a ("'[N]o exact formula can dictate a resolution to such fact-intensive cases.'" (quoting *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring))); 07-100 Pet. App. 6a ("In the absence of [the requisite] evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*."). The Fifth Circuit thus stated a natural and uncontroversial proposition—that where there are almost no relevant facts available, a court cannot engage in a fact-intensive analysis.

The County's statements concerning the dangers of retaining the district court's judgment address a wholly different issue. When a district court issues an unreviewed and ultimately unreviewable judgment concerning constitutional issues, the impact of that judgment is by no means limited to the specific facts and context before it. Rather, the court sets a precedent which forms part of the jurisprudential backdrop against which courts and parties must evaluate even arguably analogous cases in the future. Certainly, if the County redisplays the Monument, even in a different location and different context, the district court's judgment in this matter will necessarily affect the course of any resulting litigation. After all, that judgment, however suspect it might be, interprets and applies the constitutional principles pursuant to which the redisplay must be evaluated. "Constitutional adjudication being a matter of great gravity and delicacy" (*Kremens v. Bartley*, 431 U.S. 119, 128 (1977) (citation and internal quotation marks omitted)), courts of appeals have "emphasized the avoidance of constitutional questions as one of the bases for vacatur," *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 354 (D.C. Cir. 1997) (citing, *inter alia*, *Kremens*, 431 U.S. at 128, 133-34 & n.15) (internal quotation marks omitted). The County's recognition of this basic principle in its contentions to this Court does not in any way conflict with or even relate to its earlier assertions that the Fifth Circuit could not conduct the necessary Establishment Clause analysis with the very limited facts before it. These state-

ments provide no grounds for this Court to review the Fifth Circuit's mootness analysis in this matter.

IV. Reviewing The Vacatur Determination Without Also Reviewing The Justiciability Determination Would Not Lead To Incoherence Or Unfairness.

In a final effort to suggest interconnectedness between the issues of justiciability and vacatur, Staley complains that reviewing the latter without review of the former would lead to an incoherent and unfair result. On the contrary, such review would permit the *only* logical and fair conclusion to this litigation.

It would be eminently logical for this Court to review vacatur without reviewing justiciability. As discussed above, the Fifth Circuit below arrived at two entirely separate holdings in this matter. It concluded that the matter was moot because the Monument no longer affected Staley and because there was insufficient information about a possible redisplay of the Monument to conduct an Establishment Clause analysis at this point. It independently held that the district court's judgment could stand, despite its recognition that "the bottom-line cause of the [Monument's] removal was related to the ongoing renovations." 07-100 Pet. App. 10a. The County's petition asks this Court to review not the particular facts undergirding each of these holdings, but rather the *logical relation* between the two holdings derived by the Fifth Circuit *from* those facts. This Court in *Munsingwear* observed that mootness through actions unrelated to the litigation should *automatically* result in vacatur. *See* 340 U.S. at 39-40. The County simply requests that this Court reiterate the necessity of that consequence in the face of the Fifth Circuit's erroneous view that *U.S. Bancorp* somehow undermined it. Doing so would simply reinforce the logic of *Munsingwear* itself.

Review of the vacatur holding alone would also not lead to an unfair result. Staley complains that such review would threaten to strip her of "both a favorable decision and the

ability to litigate her case to its conclusion, while at the same time having no assurance that the County will not simply repeat the selfsame challenged behavior immediately upon dismissal of the case." Cross-Pet. 10. However, as noted above, the redesign of the Courthouse and plaza will make it physically impossible for the County to return the Monument to its present location. As the Fifth Circuit recognized (07-100 Pet. App. 6a), any dispute about a potential redisplay of the Monument in some alternative location on the reconfigured premises is far too speculative at this point to give rise to any legitimate interest on the part of Staley. In fact, review of the Fifth Circuit's decision on vacatur will *prevent* unfairness by removing from any prospective litigants in this matter or analogous matters the burden of a suspect and unreviewable district court judgment with significant impact on First Amendment concerns.

CONCLUSION

For the foregoing reasons, the conditional cross-petition should be denied.

Respectfully submitted.

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KAY STALEY,

Cross-Petitioner,

v.

HARRIS COUNTY, TEXAS,

Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR CROSS-PETITIONER

The en banc court's mootness ruling entailed substantial legal error. But Staley suffered no prejudice because the retention of the district-court decision ensures that the behavior she challenged will not recur. If, however, this Court were to reverse the vacatur ruling, clearing the path for a legally indistinguishable redisplay, Staley's interests would be severely prejudiced: If the County were to erect a legally identical redisplay, Staley's only recourse would be to relaunch from scratch a lawsuit that has already consumed four years of personal (not to mention judicial) resources.

In contrast, the only consequence that the County identifies as flowing from retention of the district-court decision is that the decision "sets a precedent which forms part of the jurisprudential backdrop against which courts and parties must evaluate even arguably analogous cases in the future." Cross-Opp. 10. But the district-court decision is not binding on any court, even the one that issued it — a point that the County ignores. And the Fifth Circuit has instructed that the decision's effect is limited to precluding "relitigation of the identical issues by the same parties under the same circumstances" (Pet. App. 14a), and that a new display arising in a different context would merit a new legal analysis (*id.* at 6a), thereby providing the County with ample cover from any overreaching.

The retention of the district-court decision was, under those circumstances, eminently reasonable. But if this Court reopens that ruling, the en banc court's mootness ruling presents a classic instance in which a conditional grant of certiorari is warranted. *See generally Snepp v. United States*, 444 U.S. 507 (1980) (granting conditional cross-petition where cross-petitioner's interests were adequately protected by relief awarded below, but undoing that relief would cause prejudice unless relief rejected by court of appeals were adopted in its place).

I. The En Banc Court's Mootness Ruling Was Erroneous.

A. The Court Below Confused Ripeness with Mootness.

The question in this case is not whether a challenge to a *future* display is ripe; it is whether Staley's challenge to the *old* display is moot. *Cf.* Pet. App. 6a; Cross-Opp. 9-10. Ripeness relates to whether a plaintiff would have standing to bring a new lawsuit; mootness relates to whether a pre-existing lawsuit can continue. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 191-92 (2000). While the "prospect that a defendant will engage in (or resume) harmful conduct may be too speculative" to establish standing, that does not mean it is "too speculative to overcome mootness." *Id.* at 190.

Accordingly, this Court held in *Laidlaw* that the closure of the defendant's plant did not necessarily moot the case because the plant could be reopened, though a new action brought after the closure would have been unripe. *Id.* at 190-94. Similarly, this Court held in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), that a plaintiff could not initiate a challenge to a policy to which he was not imminently subject (*id.* at 105-10), though a temporary cessation of the policy would not have mooted a case that had been justiciable at its inception (*id.* at 101).

Hence, that the details of a future display are unknown, and that Establishment Clause inquiries are fact-intensive, does not moot Staley's challenge to the old display (the details of which *are* fully known). Rather, the mootness inquiry turns on whether the display has been irrevocably removed. *See Laidlaw*, 528 U.S. at 193.

B. The County Has Not Met Its Burden to Demonstrate That the Monument Has Been Irrevocably Removed.

For a case to be mooted by cessation of the challenged conduct, the party asserting mootness must demonstrate both that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" (*County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)), and that it is

"*absolutely clear* that the . . . behavior could not reasonably be expected to recur" (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 66 (1987) (internal quotation marks and citation omitted)).

Here, the County has pledged to redisplay the monument. *See* Pet. App. 13a. Although it has claimed that "the redesign of the courthouse building and plaza will make it a physical impossibility to return the Monument to its past location" (County's En Banc Br. 8; *see also* Cross-Opp. 3 ("it is beyond doubt that the Monument will never again be located in the place that prompted Staley's suit")), it submitted no affidavits, renovation plans, or anything else to substantiate that claim. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (referring to affidavit submitted with suggestion of mootness).[1] A party's "own statement[s,] . . . . standing alone, cannot suffice to satisfy the heavy burden of persuasion" to demonstrate mootness. *See United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968).

And even if the County had shown that the monument could not be returned to the precise spot on which it formerly stood, the County has not demonstrated that there is anything to deter the monument's placement a few feet away or in any other location substantially similar to the old one. A defendant cannot

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[1] The County's statements regarding its past actions are as untested as its statements about its future intentions. *See* Cross-Opp. 3 (baldly asserting that "it is clear that the County [did not] remove[] the Monument to moot the litigation"). The en banc court was unpersuaded. *See* Pet. App. 10a (noting that "the timing of the removal may be open to question"); *id.* at 14a ("when we raised the issue [of the renovation], Harris County proceeded on its own volition to remove the monument only days before oral argument, and now it seeks advantage of its conduct"). Although the en banc court said that "the bottom-line cause of the removal was related to the ongoing renovations" (*id.* at 10a), it did not say that the renovation was the *sole* reason for the removal. If it had, it would have been overreaching: The County's "motivation is . . . a factual question" unamenable to decision without a hearing. *See Hunt v. Cromartie*, 526 U.S. 541, 549-52 (1999); *cf. Laidlaw*, 528 U.S. at 193 (holding that likelihood of recurrence was a factual matter warranting evidentiary development).

moot a case by ceasing challenged activity, only to undertake new action that differs "only in some insignificant respect." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Indeed, even if the County had disavowed an intention to pursue a legally indistinguishable redisplay, "[t]he possibility that [it] may change its mind in the future is sufficient to preclude a finding of mootness." *See United States v. Generix Drug Corp.*, 460 U.S. 453, 457 n.6 (1983).[2]

The County's only response is to assert that the voluntary-cessation doctrine simply does not apply. Cross-Opp. 2-5. It argues that mootness resulted from "changed circumstances," not from cessation of conduct. *Id.* at 5. But mootness *always* rests on changed circumstances. Here, the form that the change took was the monument's removal. *See* Pet. App. 6a (the monument is now "[o]ut of sight in some warehouse [so it] no longer raises the potential Establishment Clause violations that offended Staley"). If this case is moot, it is because, and only because, "the challenged conduct [has] cease[d]." *City of Erie*, 529 U.S. at 287.[3]

In *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (cited at Cross-Opp. 3), by contrast, the voluntary-cessation doctrine was not triggered because the challenged conduct had not ceased. Rather, the case became moot because the plaintiff's impending

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[2] The County argues that "even Staley concedes it is impossible to know . . . whether any redisplay will run afoul of this Court's context-sensitive Establishment Clause cases." Cross-Opp. 3. But when it is impossible to know whether challenged conduct will recur, a case is decidedly not moot. *See* cases cited at Cross-Pet. 7-8.

[3] The County argues that the monument's removal does not constitute "judicial relief." Reply 2. But a mootness ruling does not rest on a plaintiff's having obtained *judicial* relief; it obviates the need for such relief. Mootness arises in this case, if at all, because Staley has obtained the result that she sought (removal of the display), albeit without a final appellate pronouncement. *Cf. Lane v. Williams*, 455 U.S. 624, 633 (1982) (finding case moot because, "[t]hrough the mere passage of time, respondents ha[d] obtained all the relief that they sought").

graduation ensured that he would never again be subjected to that conduct. *See* 416 U.S. at 318. Here, mootness arises from the display's removal, not from a change in Staley's status.

The County contends that the voluntary-cessation doctrine applies only when action is taken "for the purpose of mooting the litigation." Cross-Opp 3, 4-5. In fact, the doctrine applies whenever the defendant has ceased the challenged activity, irrespective of *why* it did so. *See, e.g.*, *Concentrated Phosphate*, 393 U.S. at 202-03 (applying doctrine to determine whether antitrust action was mooted by developments that made it uneconomical for defendant to continue challenged activity, even though developments were not attributable to defendant); *Laidlaw*, 528 U.S. at 193-94 (applying doctrine to assess whether environmental organizations' challenge to plant's emissions became moot when plant was closed, without any indication that closure was due to litigation); *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349, 352 (D.C. Cir. 1997) ("voluntary cessation analysis governs our mootness inquiry" even though "legislature may [have] act[ed] out of reasons totally independent of the pending lawsuit"); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) (Alito, J.).

The County also claims that the "conduct at issue" is its effort to maintain the constitutionality of the Monument . . . in the face of Staley's . . . challenge" — something it has not voluntarily forgone. Cross-Opp. 4. But the conduct at issue under the voluntary-cessation doctrine is the "*challenged* conduct" (*City of Erie*, 529 U.S. at 287), not the party's *defense* of that conduct. And the County exaggerates when it claims that it has been involuntarily foreclosed from persisting with its defense. *See* Cross-Opp. 4; *accord* Reply 6 (pointing to unfairness in retaining decision that County "cannot appeal"). The case undoubtedly would have remained justiciable if the County had simply asserted that it wants to reserve the option to erect the monument outside the building's main entrance in a location akin to the old one. So why has it forsworn that

option? Because it *wants* to avoid adjudication; not because it lacks the power to bring such adjudication about. And if it has truly forsworn a legally identical redisplay, why does the County care whether the district-court judgment stands?

II. Mootness and Vacatur Are Distinct but Related Inquiries.

The County argues that "this Court is not in the habit of reaching out for fact-bound issues that provide the necessary predicate for the question that *is* certworthy." Cross-Opp. 2. But nor is the Court in the habit of considering legal issues in a vacuum. In this case, mootness is not merely the predicate to vacatur; the two rulings draw on an overlapping universe of facts. *See* Cross-Pet. 5-10.

The County denies any overlap, arguing that vacatur and mootness are "entirely separate inquiries" (Cross-Opp. 6), with mootness hinging on "whether or not the plaintiff retain[s] a personal interest in the outcome" (*id.* at 7 n.3). But the County concedes that the intent behind the mooting action and the likelihood of recurrence are central to the mootness analysis. *Id.* And it does not dispute that those considerations can likewise factor into the vacatur analysis. *See* Cross-Opp. 7.

To be sure, courts most often address the other considerations that Staley cited — the litigants' candor and the length of the litigation (*see* Cross-Pet. 5-6) — in conjunction with vacatur rather than mootness, but it is by no means error to do otherwise, because those issues likewise bear on the plaintiff's continuing stake in the case. If a party has not been forthcoming with the courts, it is eminently reasonable to discredit the party's promise not to re-offend. *See City of Erie*, 529 U.S. at 288 (noting that Court's "appraisal of Pap's affidavit [was] influenced" by Pap's delay in bringing mooting action to Court's attention). And if a defendant has "litigated up to this Court and back down again" (*Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)), one can only assume that it has a strong attachment to the challenged behavior, and that

any abandonment of the practice may be short-lived (*see Gray v. Sanders*, 372 U.S. 368, 376 (1963) ("voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing")). *See also Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1000 (5th Cir. 1981) (declining to find case moot where "[d]efendants disputed the constitutionality of the practice up to the day of trial, when defense counsel for the first time indicated they had no intention of reviving the [challenged religious] devotionals").

The County inadvertently concedes the factual overlap that it contests. In discussing mootness, it argues (incorrectly, *see supra*, at 5) that the voluntary-cessation doctrine applies only when the defendant acts "for the purpose of mooting the litigation and with a view toward resuming *wrongful conduct*." Cross-Opp. 3. But that is virtually indistinguishable from the dividing line that the County advocates for *vacatur*: "There is substantial confusion among the courts of appeals [about whether to vacate when the appellant's] actions were not taken to influence the litigation." Pet. 10; *see also* Pet. 11-12.[4]

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[4] The County retreats from its earlier position when it denies the inconsistency between its mootness and vacatur arguments. In its Petition, the County argued that the district court's ruling "will impede . . . redisplay [of] the Monument." Pet. 16. Now, however, the Count asserts only that the decision "sets a precedent which forms part of the jurisprudential backdrop" for Establishment Clause cases generally. Cross-Opp. 10. But the new argument fares no better: District-court decisions lack any controlling effect (*see* Opp. 26), and the en banc court has explicitly cabined the decision's reach (*see supra*, at 1).

The County also denies any tension between its attorney-fee and mootness arguments, asserting that Staley's argument to the contrary "shows a fundamental misapprehension of the mootness doctrine." *See* Cross-Opp. 9 n.5. But the error is the County's, in relying on an exceedingly vague formulation of the events giving rise to mootness. *See id.* (referring to "changes in the circumstances"). If this case is moot, it is because the challenged behavior has ceased. Cessation may not necessarily make the plaintiff a prevailing party under 42 U.S.C. § 1988 (though Staley satisfies

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To say that mootness and vacatur can rest on overlapping factual predicates does not conflate the two inquiries. *Cf.* Cross-Opp. 7-8. Compensatory damages and injunctive relief usually rest on the same unlawful conduct, but they remain distinct legal issues. Indeed, the very existence of the judicial-estoppel doctrine (*see* Opp. 24 n.14) makes clear that a single consideration can underlie two or more issues that arise successively in a case.

What is more, if the County were correct that the length of the litigation and the litigants' candor cannot inform the mootness analysis (*see* Cross-Opp. 7 n.3), that limitation would provide an important reason to reject the County's proposed vacatur standard, which likewise turns a blind eye to those considerations. For if those aspects of a case cannot enter into the mootness analysis *or* the vacatur inquiry, then when can they be considered? Legal rules that disregard the equities will yield inequitable results. Indeed, under the County's view of the law, a court could not distinguish between a litigant that manipulates the court's jurisdiction by withholding information, and one that displays uncompromising candor. Nor could a court distinguish between a case that has been ongoing for a decade, with favorable rulings accruing to the plaintiff throughout, and one that was filed yesterday. Surely, a one-size-fits-all rule is more likely to produce inequitable results than is a rule that takes the equities into account.

The County complains that an equitable rule "has very little to recommend it when, as this case demonstrates, it produces results so demonstrably at odds with equity." Reply 6. But

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[4] (...continued)
the statutory definition (*see* Opp. 26-30)), but there is no denying that this case is moot, if at all, because Staley has obtained the result she sought.

One other point regarding attorneys' fees warrants mention: Contrary to the County's contention (*see* Reply 9-10), it is well established that collateral issues, *including attorneys' fees*, can be decided after an action has been dismissed for lack of jurisdiction. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990).

where is the inequity in asking the County to keep its promise not to re-offend — a promise on which the en banc court relied in depriving Staley of an opportunity to cement her victory?

To make matters worse, the County's proposed vacatur standard would disallow courts to distinguish between a party's unilateral acts, on the one hand, and earthquakes or other acts of God, on the other. *See* Reply 2. To date, the parties' respective fault for the mootness has been the *central* factor in the vacatur analysis (*see U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-29 (1994)), with *Bancorp* and *Karcher* straightforwardedly defining 'happenstance' to entail "'circumstances unattributable to any of the parties'" (*Bancorp*, 513 U.S. at 23 (quoting *Karcher v. May*, 484 U.S. 72, 83(1987))).[5] When mootness has resulted from developments that are attributable to the party asserting mootness, this Court has generally denied vacatur even when the developments were unrelated to the litigation.[6] Accordingly, the County's proposed

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[5] *Center for Biological Diversity v. Lohn*, 483 F.3d 984 (9th Cir. 2007) (cited at Reply 5), reaffirmed the Ninth Circuit's allegiance to the principle that happenstance vacatur does not pertain when "the appellant's unilateral acts prevent appellate review of an adverse judgment." *Id.* at 990. Even most legislative-amendment cases do not label the mootness "happenstance." Rather, they treat the mooting event as voluntary action by the loser below, but they conclude that equitable considerations nonetheless favor vacatur. *Khodara*, 237 F.3d at 194-95; *NBPA*, 108 F.3d at 351-54. Some legislative-amendment cases have rested on happenstance, but that was because the amendment was deemed unattributable to the *litigant*, not merely because it was unrelated to the *litigation*. *See Rendell v. Rumsfeld*, 484 F.3d 236, 243 (3d Cir. 2007); *see also Bancorp*, 513 U.S. at 25 & n.3 (noting that happenstance vacatur would have been granted in *Munsingwear* only because mooting action "[could]not fairly be attributed" to litigant).

[6] In *Karcher*, the decision to capitulate resulted not from litigation-related developments but from an unrelated turnover in the defendant-legislature's make-up. 484 U.S. at 76. And *Laidlaw* includes no indication that the defendant-polluter chose to close its plant because of the litigation. 528 U.S. at 179, 193-94. Yet this Court nonetheless applied a presumption against vacatur in both cases. The County has not offered any rationale for why this case should be subject not merely to the opposite presumption, but to an

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standard — which makes vacatur turn exclusively on whether the mooting event was related or unrelated to the litigation — would mark a significant departure from the Court's longstanding practice. *See* Opp. 9, 14.

If the litigants' responsibility for the mooting action could no longer inform the vacatur analysis, then it would merit treatment in assessing mootness — lest it not be considered at all. Addressing it as part of the mootness analysis is perfectly compatible with Article III — because the unilateral power to cease offending behavior presumptively encompasses the power to re-offend (*cf. Generix Drug Corp.*, 460 U.S. at 457 n.6 (fact that litigant can simply change its mind precludes case from being moot)) — though doing so has been unnecessary because the parties' respective roles in the mooting event has traditionally figured prominently in the vacatur determination.

The en banc court reasonably considered the parties' respective responsibilities for the mootness, together with the length of the litigation and the County's forthcomingness, as part of its vacatur analysis, rather than as part of the mootness determination. *Compare* Pet. App. 6a *with* Pet. App. 10a-14a. So reconsidering the vacatur ruling, without also reopening the mootness ruling, would risk disregarding these considerations altogether — a result that would be fundamentally unfair to Staley as the prevailing party, and that would encourage manipulation of the courts' jurisdiction.

CONCLUSION

If this Court grants review of the vacatur ruling, it should also review the inextricably intertwined question of mootness.

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[9] (...continued)
automatic rule at that.

Respectfully submitted.

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